

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Rulemaking to Amend Parts 1, 2, 21, and 25  
of the Commission's Rules to Redesignate  
the 27.5-29.5 GHz Frequency Band, to  
Reallocate the 29.5-30.0 GHz Frequency Band,  
to Establish Rules and Policies for Local  
Multipoint Distribution Service and for  
Fixed Satellite Services

CC Docket No. 92-297

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**U S WEST, INC. COMMENTS**

U S WEST, Inc. ("U S WEST") hereby files these comments in response to the Fourth Notice of Proposed Rulemaking in the above-captioned docket.<sup>1</sup> In the NPRM, the Federal Communications Commission ("Commission") requests comment on restricting incumbent local exchange carriers' ("LEC") and cable operators' participation in the local multipoint distribution service ("LMDS") within their respective geographic service areas. U S WEST strongly objects to this proposal. There are no statutory or regulatory reasons why incumbent LECs and cable operators should be limited in any way in their ability to participate in the provision of

<sup>1</sup> In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, Fourth Notice of Proposed Rule Making, FCC 96-311, rel. July 22, 1996 ("NPRM").

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LMDS. In fact, a LEC or cable operator providing LMDS would also provide substantial public benefits.

I. THE COMMISSION AND INTERESTED PARTIES HAVE PREVIOUSLY CONSIDERED AND CONCLUDED THAT LEC AND CABLE OPERATOR PARTICIPATION IN LMDS WILL SERVE THE PUBLIC INTEREST

Since the initiation of this rather protracted docket, the Commission and interested parties alike have considered the eligibility issue with respect to LMDS licenses.<sup>2</sup> At various stages in the proceeding, both the Commission and the majority of those parties have concluded that eligibility should be open to all qualified entities. Specifically, at the opening of this proceeding, the Commission concluded that LECs and cable operators should not be restricted from participating in LMDS.<sup>3</sup> Multiple comment rounds demonstrating the benefits of LEC and cable operator participation supported the Commission's tentative conclusion.<sup>4</sup> The benefits LECs

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<sup>2</sup> Id. ¶ 107.

<sup>3</sup> In the Matters of Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service; Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer's Preference; University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd. 557, 561-62 ¶ 27 (1993).

<sup>4</sup> In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band, to Reallocate the 29.5 - 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services and Suite 12 Group Petition for Pioneer's Preference, Third Notice of Proposed Rulemaking and Supplemental Tentative Decision, 11 FCC Rcd. 53, 90 ¶ 100, 92 ¶ 104 (1995) ("Third NPRM").

and cable operators can bring to the embryonic LMDS are just as compelling in the emerging competitive markets created under the Telecommunications Act of 1996.<sup>5</sup>

In the NPRM, the Commission states:

The wealth of innovative services possible with the LMDS broadband spectrum we make available includes two-way video, teleconferencing, telemedicine, telecommuting, data services and global networks. LMDS systems have the capacity to provide broadband video-on-demand and distance learning. Moreover, LMDS' cellular-like capabilities enable it to offer diverse services within the same region, and to jointly offer services traditionally provided by separate communications service providers.<sup>6</sup>

LEC/cable operator participation will promote the rapid development of these diverse services and technologies, consistent with the Commission's obligation under the Communications Act to "encourage the provision of new technologies and services to the public."<sup>7</sup> Having been in similar businesses for years, these companies are best equipped to become viable LMDS competitors. These incumbents have the efficiencies of scale and scope and the necessary expertise, capital, existing infrastructure, and experience to promote the early development of LMDS.<sup>8</sup> They are each already equipped to compete on an expedited basis with each other. Through LMDS, LECs can provide video service in competition with the incumbent cable op-

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<sup>5</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

<sup>6</sup> NPRM ¶ 15.

<sup>7</sup> 47 USC § 157(a); see also 1996 Act, 110 Stat. at 56 ("[t]o . . . encourage the rapid deployment of new telecommunications technologies").

<sup>8</sup> We note that for similar reasons, the Commission decided it would be in the public interest to allow cellular carriers to provide personal communications services ("PCS") both inside and outside of their cellular service area. In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, 8 FCC Rcd. 7700, 7744-45 ¶¶ 104-105 (1993).

erator which can in turn provide competitive telephone service. Finally, incumbents are uniquely positioned to provide this new service to consumers in certain areas (e.g., rural areas) which non-incumbents may find less attractive or cost prohibitive to serve.<sup>9</sup>

The Commission's concerns that these incumbents will use LMDS spectrum to forestall rather than promote competition are unwarranted. Throughout the four years that this docket has been open, there has been no evidence that either LECs or cable operators will engage in any such anticompetitive behavior. Likewise, there will be no such evidence at the conclusion of this comment phase. To adopt a regulation restricting LEC/cable operator participation without such support would be to engage in arbitrary and capricious rulemaking. "[S]imply precluding a class of potential licensees from obtaining licenses (without a supported economic justification for doing so) solves the problem arbitrarily."<sup>10</sup>

Moreover, it is highly implausible that a LEC or cable operator would "sit" on something for which it bid thousands/millions of dollars simply to prevent competition. As the Commission recently reiterated in deciding whether to restrict eligibility, whoever values the spectrum most will obtain it.

[A] key purpose of competitive bidding is to let the marketplace determine the level of demand for licenses. Use of competitive bidding also seeks to ensure that licenses are granted to those who value the spectrum most highly. Where multiple applicants are interested in serving a certain geographic area, we believe it is inappropriate to

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<sup>9</sup> New entrants will likely target high-density urban areas where costs are lowest and margins are highest.

<sup>10</sup> Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752, 764 (6th Cir. 1995)

limit eligibility to certain applicants while preventing others from bidding on the license.<sup>11</sup>

In that proceeding, the Commission was examining ways to promote continued growth and vigorous competition in the paging industry. To do so, the Commission concluded that it would not restrict eligibility.<sup>12</sup> For similar reasons, the Commission should not do so here either.

Concerns about anticompetitive behavior are groundless.<sup>13</sup> As it was determined before, so it should be determined now: LEC and cable operator participation should not be restricted.<sup>14</sup>

## II. THE 1996 ACT DOES NOT ALTER THE PREVIOUS CONCLUSION THAT LECs AND CABLE OPERATORS MAY LEGALLY PARTICIPATE IN LMDS WITHOUT RESTRICTION

As the Commission notes, previous commenters in this proceeding have demonstrated that there are no legal restrictions on LECs or cable operators acquiring

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<sup>11</sup> In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Notice of Proposed Rule Making, 11 FCC Rcd. 3108, 3122 ¶ 66 (1996) (footnote omitted).

<sup>12</sup> Id. It is interesting to note that there was some concern for protecting the incumbent operations in that proceeding. The Commission concluded that restricting eligibility in favor of incumbents simply would allow incumbents to obtain the benefits of geographic licensing for less than full market value. Id. Here, if the Commission were to restrict LEC/cable operator participation, the winning licensee would likewise be allowed to obtain LMDS spectrum for less than full market value.

<sup>13</sup> We note that LEC and cable operator LMDS licensees, like all LMDS licensees, are subject to the performance requirements the Commission ultimately adopts.

<sup>14</sup> Third NPRM, 11 FCC Rcd. at 90 ¶ 100, 92 ¶ 104.

an LMDS license in their respective service area.<sup>15</sup> The enactment of the 1996 Act does not change that conclusion. In fact, it emphasizes its accuracy.

The 1996 Act, among other things, reflects Congress' aim to facilitate the entry of new competitors into various telecommunications markets, including the entry of LECs and cable operators into each others' markets. LMDS spectrum will assist cable operators in providing local telephone services in competition with LECs. Conversely, LECs, as LMDS licensees, can provide alternative video services. To stifle these opportunities in any way would clearly be inconsistent with the intent of Congress.

Several actions taken by Congress plainly indicate under what circumstances it thought it appropriate to restrain LECs or cable operators. For example, it eliminated the cable-telephone company cross-ownership ban.<sup>16</sup> It also provided LECs with the opportunity to enter the long distance market in its service area under certain conditions.<sup>17</sup> If Congress had wanted to exclude, restrict or delay LEC and/or cable operator provision of LMDS services, it could have and would have. As such, to limit LEC/cable operator in-region provision of LMDS, for example, until the 1996 Act's Section 271(c)(2)(B) checklist has been met, is clearly absurd.<sup>18</sup>

In the NPRM, the Commission states that: "As a deregulatory principle, [it] does not seek to interfere in or distort decisions based on sound business judgment

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<sup>15</sup> NPRM ¶ 110.

<sup>16</sup> 1996 Act, 110 Stat. at 119-121 § 652.

<sup>17</sup> Id., 110 Stat. at 86-89 § 271.

<sup>18</sup> NPRM ¶ 135.

by imposing unnecessary regulation."<sup>19</sup> To restrict LEC/cable operator participation would be contrary to this principle. Moreover, "the responsibility of the Commission is to follow the letter of the law -- nothing more and nothing less."<sup>20</sup> The 1996 Act contains no restriction on LEC/cable operator participation. Imposing any such regulation via regulation would amount to overreaching by the Commission.

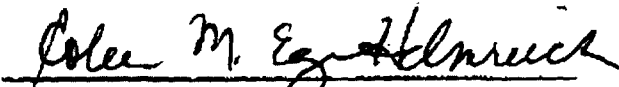
### III. CONCLUSION

Restricting LEC and/or cable operator participation in LMDS has no basis in law. Rather, these two categories of telecommunications service providers are uniquely positioned to facilitate the development of this new service and should be allowed to participate fully in the provision of LMDS.

Respectfully submitted,

U S WEST, INC.

By:

  
Coleen M. Egan Helmreich  
Norm Curtright  
Suite 700  
1020 19th Street, N.W.  
Washington, DC 20036  
(303) 672-2737

Its Attorneys

Of Counsel,  
Dan L. Poole

August 12, 1996

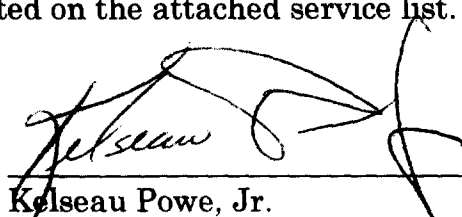
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<sup>19</sup> Id. ¶ 125.

<sup>20</sup> Hearing of the Telecommunications and Finance Subcommittee of the House Commerce Committee, July 18, 1996, Statement of Rep. Thomas J. Bliley.

## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 12th day of August, 1996,  
I have caused a copy of the foregoing **U S WEST, INC. COMMENTS** to be served  
via hand-delivery upon the persons listed on the attached service list.



---

Kelseau Powe, Jr.



James H. Quello  
Federal Communications Commission  
Room 802  
1919 M Street, N.W.  
Washington, DC 20554

Reed E. Hundt  
Federal Communications Commission  
Room 814  
1919 M Street, N.W.  
Washington, DC 20554

Susan P. Ness  
Federal Communications Commission  
Room 832  
1919 M Street, N.W.  
Washington, DC 20554

Rachelle B. Chong  
Federal Communications Commission  
Room 844  
1919 M Street, N.W.  
Washington, DC 20554

Regina M. Keeney  
Federal Communications Commission  
Room 500  
1919 M Street, N.W.  
Washington, DC 20554

Michele Farquhar  
Federal Communications Commission  
Room 5002  
2025 M Street, N.W.  
Washington, DC 20554

Donald H. Gips  
Federal Communications Commission  
Room 800  
2000 M Street, N.W.  
Washington, DC 20554

Meredith Jones  
Federal Communications Commission  
9th Floor  
2033 M Street, N.W.  
Washington, DC 20554

William E. Kennard  
Federal Communications Commission  
Room 614  
1919 M Street, N.W.  
Washington, DC 20554

Thomas Tycz  
Federal Communications Commission  
Room 800  
2000 M Street, N.W.  
Washington, DC 20554

Robert M. Pepper  
Federal Communications Commission  
Room 822  
1919 M Street, N.W.  
Washington, DC 20554

Jennifer Gilsenan  
Federal Communications Commission  
Room 511  
2000 M Street, N.W.  
Washington, DC 20554

Robert James  
Federal Communications Commission  
Room 8010-B  
2025 M Street, N.W.  
Washington, DC 20554

Nancy Boocker  
Federal Communications Commission  
Room 5126-J  
2025 M Street, N.W.  
Washington, DC 20554

Walter Strack  
Federal Communications Commission  
Room 5202-F  
2025 M Street, N.W.  
Washington, DC 20554

Jennifer Warren  
Federal Communications Commission  
Room 5002-E  
2025 M Street, N.W.  
Washington, DC 20554

International Transcription  
Services, Inc.  
Suite 140  
2100 M Street, N.W.  
Washington, DC 20037

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